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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR—GUY A. THOMPSON, TRUSTEE, ET AL.,

Petitioners,

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

At the time this case was argued before this Court, different members of the court expressed an interest in the following propositions, and leave was granted respondents to file this supplemental brief bearing upon said propositions.

No lengthy discussion will be made of the propositions in question. Attention of the Court will be directed to the contentions of respondents, citation of applicable statutes and authorities will be given, and a brief argument made upon each point.

The propositions in question are as follows:

I. *The holding and opinion of the Interstate Commerce Commission in the cause pending before it, and the effect, if any, of that opinion upon the cause in this court.*

II. *Whether the position of the Port of Brownsville and the respondent shippers in this case is affected by the fact that the tariff upon which they rely is called by the carriers a "switching tariff."*

III. *Whether the position of the Port of Brownsville and the respondent shippers in this case is affected by the fact that the carriers involved have not published joint through rates.*

IV. *Whether the remedy of mandamus may be applied in any case except one involving discrimination.*

I.

The Holding and Opinion of the Interstate Commerce Commission in the Cause Pending Before It, and the Effect, If Any, of that Opinion Upon the Cause in This Court.

On the argument of this case, the Court expressed an interest in the opinion of the Interstate Commerce Commission in *Brownsville Navigation District of Cameron County, Texas, et al, v. St. Louis, Brownsville and Mexico Railway Co., et al*, 225 I.C.C. 246, which cause involved, before the Interstate Commerce Commission, the question of discrimination as between shippers and communities resulting from the carriers' acts other than

unequal enforcement of existing and published rules, rates and regulations. It also involved a question of discrimination resulting from the practices of carriers in permitting their equipment to go into the Republic of Mexico when transporting commodities through ports other than Brownsville but refusing to permit such equipment to move into Mexico when transporting commodities moving through the Port of Brownsville. In the latter named particular, there is some similarity between the issues before the Commission and the issues here but the Commission has held, following the decision of this Court in *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208, that it is without jurisdiction to determine the matters involved in the proceeding presented to the Federal District Court. *C. S. Wells v. Chicago, Burlington & Quincy Rd. Co.*, 161 I.C.C. 145 and *In the Matter of Private Cars*, 50 I.C.C. 652-671. For the convenience of the Court, a copy of the opinion of the Interstate Commerce Commission in the Brownsville case is attached as an appendix to this brief. The attention of this Court is particularly directed to Paragraph 4 of the syllabus to the opinion and to the last paragraph on page 247 and the first two paragraphs on page 248 of the opinion.

The opinion of the Interstate Commerce Commission reserved for future consideration the questions here presented until this Court determined the question of juris-

diction. (Page 248, opinion of the Commission attached hereto.) The Commission stated:

> "Under the circumstances our finding at this time will be confined to the alleged violation of section 3."

The Commission, therefore, determined only Section 3 matters as between the shippers using the Port of Brownsville and those using the Port of Corpus Christi in the handling of traffic to and from the Republic of Mexico. The case before this Court involves the matter of the discriminatory enforcement of existing published tariffs for the transportation of commodities at published rates. The matter has not been passed upon by any tribunal and the only question here presented is the jurisdiction of the lower court to pass upon that question.

II.

Whether the Position of the Port of Brownsville and the Respondent Shippers in This Case is Affected by the Fact That the Tariff Upon Which They Rely is Called by the Carriers a "Switching Tariff."

The contention of the respondents in this case may briefly be summarized as follows:

1. Under tariffs of petitioner carriers on file with the Interstate Commerce Commission, respondents have the right to receive "transportation" service on shipments from the Port of Brownsville to the interchange between the St. Louis, Brownsville and Mexico Railway

Company and the Brownsville & Matamoros Bridge Company.

2. Such "transportation" under the applicable statutes and holdings of both the Interstate Commerce Commission and this Court includes both actually moving the traffic and furnishing necessary equipment for same.

3. The carriers herein have refused to (a) permit the loading of cars at the Port of Brownsville, regardless of the ownership of such cars, when they are destined to the interchange with the Brownsville and Matamoras Bridge Company, although the carriers will permit the loading of cars at the Port of Brownsville when such cars are destined to any other point in the United States; (b) move cars from the Port of Brownsville to the connection with the Brownsville and Matamoras Bridge Company, although said carriers will move cars from the Port of Brownsville to any other point in the United States; (c) move cars from the connection with the Brownsville and Matamoras Bridge Company to the Port of Brownsville regardless of the ownership of the cars and regardless of how they reach the connection with the Brownsville and Matamoras Bridge Company through Mexico, although the carriers will move such cars from the connection with the Brownsville and Matamoras Bridge Company if said cars have as their destination the Port of Corpus Christi, or any other point in the United States except the Port of Brownsville; and (d) furnish reasonable equipment for the "transportation" desired by the respondents, although the carriers will furnish such

equipment for "transportation" from the Port of Brownsville to any point in the United States other than the connection with the Brownsville and Matamoras Bridge Company.

4. No question of car shortage or of car distribution rules because an emergency is involved in this case.

5. The obligation of petitioner carriers is not changed because of the fact that the tariff of the St. Louis, Brownsville and Mexico Railway Company is called by the carrier a "switching tariff."

6. The obligation of petitioner carriers is not affected by the fact that joint through rates are not published.

7. Since the carriers refuse to perform the transportation services to which respondents are entitled, respondents have the right to invoke the remedy of mandamus as specifically authorized by Title 49, Section 49, U. S. C. A.

We believe that our original brief filed in this case shows beyond question that "transportation" to which a shipper is entitled includes the furnishing by the carrier of reasonable equipment and that joint responsibility rests upon the different carriers involved in a shipment to furnish such equipment regardless of the line upon which the traffic originates. Upon the argument before the Court, the point was raised by the petitioners that regardless of the duties of the carriers in an ordinary case of this kind, the instant case is to be distinguished because the St. Louis, Brownsville and Mexico tariff is

merely a "switching tariff." Different members of the Court evidenced an interest in this particular point.

There are several different answers to this contention.

The first answer is found in the Interstate Commerce Act itself. No distinction is set forth in the Act requiring or permitting a carrier to be under different obligations to different shippers depending upon whether the traffic of those shippers is handled under a line haul tariff or under a switching tariff. On the contrary, the Act specifically states as follows [U. S. Code, title 49, sec. 1(3)]:

> "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also *all switches, spurs, tracks, terminals, and terminal facilities* of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include *locomotives, cars, and other vehicles*, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." (Emphasis ours.)

It would appear reasonable that if the petitioners are to rely upon the proposition that the duty of a carrier to furnish transportation (including equipment) is different under a switching tariff as distinguished from an ordinary tariff, then the burden should be upon the petitioners to support this contention, either by the provisions of the Interstate Commerce Act itself or by interpretations of that act by the Interstate Commerce Commission or this Court.

The next answer to this contention is found in the tariff. (R-94.)

Originally, transportation under this tariff was performed in connection with a line haul of the traffic. This was changed by the carriers themselves. L. S. Bourne, General Manager of the Port Isabel & Rio Grande Valley Railway, testified as follows:

> "Effective about June 1, 1936, by agreement between the Rio Grande, Missouri Pacific and Southern Pacific, the turning basin of the Port of Brownsville, as hereinabove prescribed, was placed in the switching limits of Brownsville, Texas. The purpose of including the turning basin in the switching limtis of Brownsville was to give to the Port of Brownsville the benefit of the freight rates available to and from Brownsville and the benefit of Brownsville switching rates." (R-126.)

Pursuant to this plan, The St. Louis, Brownsville & Mexico Railway Company filed the tariff above referred to by which they agreed to handle "all carload freight,

except as otherwise shown to or from points in Mexico" * * * BETWEEN * * * Interchange connections with other lines * * * AND * * * Interchange of the St. L. B. & M. Ry. with the Brownsville & Matamoros Bridge Company." (R-94.)

But The St. Louis, Brownsville & Mexico Railway Company went further than this. It assessed a different charge for the handling of traffic "upon which connecting lines have or will secure line haul" and "traffic originating or destined industry tracks of connecting lines within the switching limits of Brownsville, Texas." In this connection, attention of the Court is respectfully called to the fifth column of the tariff (R-94) headed "Switching Rates per Car" and the two different charges contained in that column of $3.15 and $3.50. It will be observed that note No. 8 applies to the item of $3.15 per car and that note No. 9 applies to the item of $3.50 per car.

Reading the tariff, it will be seen that the carriers agreed to charge $3.15 per car (see Note 8) "applicable only on traffic originating or destined points beyond Brownsville, Texas, upon which connecting lines have or will secure line haul" and that they demanded $3.50 per car (now see note 9) "applicable on traffic originating or destined industry tracks of connecting lines within the switching limits of Brownsville, Texas."

In other words, at the time the tariff was filed, the St. Louis, Brownsville and Mexico Railway Company de-

manded a greater charge for "transportation" in instances where no line haul was enjoyed by connecting lines than where the connecting carrier received a line haul.

It thus appears that the St. Louis, Brownsville and Mexico Railway Company had in mind the very situation involved in this case and by the provisions of the tariff voluntarily filed by it, the carrier held itself out to furnish transportation on shipments where no line haul was enjoyed by connecting lines, but in such instances a greater charge was to be exacted. This carrier now refuses to furnish the transportation covered by this particular tariff, even though the shipper is ready and willing to pay the greater charge for the service.

The next answer to the contention in question is found in the statutes and authorities quoted in our main brief and also the following.

The attention of the court is particularly directed to the case of *United States, ex rel Stony Fork Coal Co., et al (United States Intervener) v. Louisville & N. R. Co., et al, 195 Fed. Rep. 88:*

This case was not included or referred to in the original brief filed by us in this cause. The case when read in conjunction with the case of *Atlantic Coastline Railway Co. v. Smith Bros.*, 63 Fed. (2d) 747 (cited in our original brief) contains practically a complete discussion of all of the points raised by the petitioners in this cause. The full effect of the case cannot be understood except

by reading the entire opinion. The opinion in this case holds in accord with practically every contention of the respondents in the instant case.

To show how closely the case bears upon the point here immediately under discussion (namely whether or not the obligation of the carriers is affected by the so-called "switching tariff") we call attention of this Court to the following language contained in the above cited case at page 90:

> "The Louis & Nashville Railroad does not acknowledge any legal or moral obligation to furnish cars or transportation to the petitioners for the shipment of coal from the points above mentioned to Southeastern territory for the reason *that it only performs a switching service for the Southern Railway in transporting coal from said points of origin to Middlesborough*, and refuses to transport the coal of petitioners further than to Middleborough." (Italics ours.)

Mandamus was issued in that case regardless of the contentions made by the carriers, which are similar to the contentions made in the instant case.

The Interstate Commerce Commission in the case of *C. S. Wells & Sons v. Chicago, Burlington & Quincy Rd.*, 161 I. C. C. 145, held at page 149 that it was without jurisdiction to issue an order requiring the carriers to perform their transportation duties and obligations as defined by Section 1, Paragraph 4, of the Act. In that case, the defendant railroad had refused to deliver loaded cars on complainant's tracks which served its warehouse in Keokuk, Iowa, when such traffic was received from

connecting carriers reaching Keokuk. In other words, defendant C. B. & Q. railroad refused to switch the traffic to the warehouse of complainant because it had not obtained a line haul on that traffic into Keokuk. The loaded cars were tendered to the carrier for transportation under existing published tariffs. At page 148, the Commission stated:

> "It seems obvious that, in the absence of restricting tariff provisions, the publication of a charge for a given service carries with it an obligation to perform the service for which the charge is named. This seems to be conceded by the defendant; its defense is based upon other grounds."

After concluding that the carriers were violating their published tariff and refusing to transport in accordance with the requirements of Section 1, Paragraph 4, the Commission concluded at page 149:

> We further find that the defendant's tariff herein named requires it to perform the switching service requested by the complainants, and that the refusal of the defendant to perform such service in accordance with the said tariff is a violation of its tariff and of its duty under section 1, paragraph (4) of the act. *We conclude, however, that this commission is without jurisdiction to prescribe a remedy for either of said violations.*" (Italics ours.)

That decision was rendered Jan. 28, 1930. It followed an interpretation of Section 1, Paragraph 4, in the case of *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208.

Also it followed a previous decision of the Commission interpreting the same section of the act. See *In the Matter of Private Cars*, 50 I. C. C. 652-671.

The case of *United States v. Pennsylvania Railroad, Supra*, involves a review of the opinion of the Interstate Commerce Commission in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Co.*, 34 I. C. C. 179. In that case the Commission had issued an order requiring the Pennsylvania railroad to furnish tank car equipment for the transportation of petroleum products. The review of the matter by the Court therefore was with reference to the power of the Commission to issue the order in question. The Court there gave consideration to Section 1, Paragraph 4, as in effect at that time. The opinion of the Commission was rendered May, 1915. The opinion of the Court in October, 1916. At that time, Section 1, Paragraph 4, provided as follows:

> "And it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; *and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.*" (36 Stat. L. 545, Sec. 7.)

In the present act the italicized portion has been omitted and other provisions reading as follows have been added:

> "and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

It will be seen that the provisions with respect to the duty to furnish transportation upon reasonable request therefore has not been materially changed. This is important because the duty to furnish transportation as construed by the Court in that case was made in the light of the term "transportation" as contained in Section 1, Paragraph 3, of the act, 36 Stat. L. 545, Section 7, in effect at that time. At that time the provisions of Section 1, Paragraph 3, provided as follows:

> "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

At the present time the amended paragraph 3 defines the term "transportation" as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

It will therefore be seen that no material change has been made in the act insofar as that controversy was concerned.

Since the present act, with respect to the duty to transport, is substantially the same as the act that was before the Commission and the Court in the cases cited, necessarily the case of *United States vs. Pennsylvania Railroad Company, supra*, is a direct and positive authority holding that the court and not the Commission has jurisdiction of the matter here under consideration. The Court in that opinion considered Section 1, Paragraph 3, defining transportation, and Section 1, Paragraph 4, defining the duty to transport. The act, as in effect at the time the opinion was rendered, and the terms and provisions of the present act, have been heretofore quoted. It is significant that the court adopted and quoted with approval a former opinion of the Commission interpretating the same sections of the act.

The Court stated the question before it in the following language (242 U. S. 218-219):

> "In other words, the main question presented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty."

At 242 U. S. 221 the Court, quoting from a former opinion of the Commission, stated:

> "The statute does not undertake to clothe Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings."

The final conclusion of the Court, with respect to the matter, is found at 242 U. S. 226-227, there the Court stated:

> "But other words occur which, it is contended, have such effect. These words are: 'And it shall be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request therefor * * *.'
>
> This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do 'upon reasonable request.' The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced.
>
> But it is said the duty having explicit declaration, the power to enforce it was found in Sec. 12 as amended March 2, 1899, as follows: 'And the Commission is hereby authorized and required to execute

and enforce the provisions of this act.' (25 Stat. at L. 855, 858, chap. 382, Comp. Stat. 1913, Sections 8569, 8576.

"But this casts us back to our general considerations, to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether, under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts, or under the statute and in the Commission and we have seen that it was the view of the Commission that the remedy was in the courts, *and that the amendment of 1906 was not intended to and did not change the remedy.* In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation." (Italics ours.)

It is clear that the jurisdiction to issue orders commanding the carriers to perform their transportation duties, as created by the common law and as defined by the statute, resides alone in the Courts.

III.

Whether the Position of the Port of Brownsville and the Respondent Shippers in This Case is Affected by the Fact That the Carriers Involved Have Not Published a Joint Through Rate.

The Circuit Court of Appeals, in its opinion in this case, stated as follows:

"It is true that the carriers in this case have pub-

lished no joint through rate, but it is admitted that they are connecting carriers, that the commerce which appellants seeks to have transported over appellees' joint lines is a through movement between the port of Brownsville and the interchange with the National Railways of Mexico; and that both of the appellees have promulgated and filed with the Commission tariffs naming per car charges for such through transportation. Therefore, there is a through route composing of the two lines of railway, there is a through rate composed of two separately published tariff factors; and there is joint responsibility for the through transportation. Atlantic Coastline Railway Co. v. Smith Bros., 53 Fed. (2) 747, certiorari denied, 289 U. S. 761, 53 Sup. Ct. 795.

"The law specifically defines through rates, and adds (Sec 6, par. 1): 'If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation.' Referring specifically to this section, in Kansas City Southern Ry. Co. v. Albers Commission Co., 223 U. S. 573, 32 Sup. Ct. 316, the court said: 'In every substantial sense, local rates and joint through rates were placed on the same level.' In United States v. Illinois Central R. R. Co., 263 U. S. 515, the court pointed out that the distinction between a joint and combination rate is without legal significance, and said: 'A through route was established; and the transportation is performed as a result of this arrangement, express or implied.'

"The Interstate Commerce Act does not require a joint through rate on each route, but 'where no joint rate is specified, the tariffs for the through routes commonly provide that the through rate shall be the sum of the local rates of the several connect-

> ing carriers contributing to the movement.' Brown Lumber Co. v. L. & N. R. Co. (Jan. 4, 1937), 299 U. S. 393. In this recent case, the court, upon the authority of Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, upheld the carrier's construction of its published rule, notwithstanding the Commission, by reparation order, had sustained the shipper's claim. If the law is what the courts do, even more than what they say, this is an authority in two aspects for the doctrine that the construction and enforcement of non-technical, unambiguous railroad tariffs present a question of law for judicial determination." (R. 145-146.)

This particular point is fully discussed in the original brief filed by us in this court at pages 13-16.

However, what may or may not be the obligation of the petitioners to the respondents (with reference to the furnishing of the transportation here involved) because of the fact that no joint through rate was published, is of no importance in so far as the issue now before this Court is concerned. The sole question before you is the question of the jurisdiction of the trial court to hear the complaint of the respondents, regardless of any defenses the carriers might have. The obligation of the carriers to the respondents arises out of the provisions of the Interstate Commerce Act. What they may or may not be required to do in this case is a matter of law. It is in no manner a matter requiring an administrative finding. The determination of no question of fact is involved. There is no disagreement between the parties with reference to the facts. There is no question with reference to the actual tariffs which apply to the shipments involved.

The parties are in agreement with reference to all facts, including the identifying of the tariffs involved.

If there is a valid defense available to the carriers in this case based upon their claim that they have no obligation to furnish cars because no joint through rate has been established, then that defense may and should be presented to the court hearing the case. The soundness or the unsoundness of this contention of the carriers will be determined by that court *as a matter of law* under judicial interpretation of the provisions of the Interstate Commerce Act.

IV.

Whether the Remedy of Mandamus May Be Applied in Any Case Except One Involving Discrimination.

It is not necessary in this case to discuss the question of whether mandamus will properly apply in the absence of discrimination against a complainant in the enforcement of tariffs or rules and regulations of a carrier, for the reason that under the undisputed facts the following discriminatory practices are shown: (Testimony of Witness Hofmokel, R. 102-114; Witness Lallier, R. 130-133; Witness Philen, R. 134-137.)

1. The carriers refuse to furnish to the Port of Brownsville and shippers at the Port of Brownsville under lawfully published tariffs the same character of service they furnish other shippers (at Corpus Christi, Texas) under similar tariffs.

2. The carriers will transport the goods of shippers from the Port of Brownsville to any other point in the

United States other than the point of interchange with the Brownsville & Matamoros Bridge Company, but they will not perform the same service for shipments of the respondents from the Port of Brownsville to such point of interchange.

3. The carriers herein involved will furnish transportation from said interchange point with the Brownsville & Matamoros Bridge Company *through Brownsville* to Corpus Christi. They will not perform the same service through Brownsville to the Port of Brownsville. This is true regardless of where the traffic originates in Mexico, who brings it to the interchange point, and who owns the cars in which it is being moved. In other words, the St. Louis, Brownsville and Mexico Railway Company will not even perform a switching service from the interchange with the Brownsville & Matamoros Bridge Company to the interchange with the Port Isabel & Rio Grande Valley Railway on cars destined to the Port of Brownsville.

4. The Missouri Pacific will switch and does switch cars furnished by The Texas Mexican Railway Company at Corpus Christi between the Port of Corpus Christi and the interchange with The Texas Mexican Railway Company while at the same time it refuses to switch cars furnished by Port Isabel & Rio Grande Valley Railway between the Port of Brownsville and the interchange with the Brownsville & Matamoros Bridge Company.

The carriers will not even permit the loading at the Port of Brownsville of cars (regardless of the ownership of such cars) with goods destined to the interchange with the Brownsville & Matamoros Bridge Company. They will permit the loading of and transport cars loaded at the Port of Brownsville for destination to any other points in the United States. . . .

By "discrimination" as herein used, we refer to that character of discrimination discussed by this court in the case of *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, wherein this court stated (page 131-132):

> "But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfairly discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say where such a rule unjustly discriminates against one class of shippers in favor of another * * *"
>
> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. * * *"

It is respectfully submitted that the decision of the Circuit Court in this cause should be affirmed.

Respectfully submitted,

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Copies of this brief have been furnished to and served upon Honorable Robert H. Kelley, attorney for Guy A. Thompson, Trustee, and St. Louis, Brownsville and Mexico Railway Company and Honorable John P. Bullington, attorney for Port Isabel & Rio Grande Valley Railway Company.

CARL B. CALLAWAY.

22034

INTERSTATE COMMERCE COMMISSION

No. 27691

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEX., ET AL. v. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY ET AL.

No. 27691

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEX., ET AL. v. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY ET AL.

Submitted July 1, 1937. Decided November 2, 1937

1. Refusal of the St. Louis, Brownsville & Mexico Railway Company to furnish cars for the transportation of freight between the port of Brownsville, Tex., and points in Mexico as to which traffic it is an intermediate switching carrier, while contemporaneously furnishing cars for the transportation of freight between other ports and points in Mexico, as to which this carrier participates in line-haul movement, found not unduly prejudicial.
2. Allegation that the failure of the Mexican lines to furnish American-owned cars in their control for the transportation of freight from Mexico to the port of Brownsville, while contemporaneously furnishing such cars for the transportation of freight to other ports in the United States, is due to instructions from the St. Louis, Brownsville & Mexico Railway Company and results in undue prejudice by that line, not sustained.
3. Refusal of the St. Louis, Brownsville & Mexico Railway Company to switch at Brownsville, Tex., cars furnished by other lines for the transportation of freight from the port of Brownsville to destinations in Mexico, while contemporaneously switching from the port of Corpus Christi, Tex., to the Texas Mexican Railway Company line at Corpus Christi freight destined to points in Mexico in cars furnished by the latter line for movement by it to Laredo, Tex., and the National Railways of Mexico beyond found unduly prejudicial to the port of Brownsville and unduly preferential of the port of Corpus Christi. Order requiring removal of this undue prejudice and preference entered.
4. No finding made respecting the allegation that the refusal of the defendants to furnish cars and transportation between the port of Brownsville and Matamoros, Mexico, results in violations of sections 1 and 6, as the question of jurisdiction under these sections is now pending before the Supreme Court of the United States.

A. L. Reed for complainants.

H. H. Larimore, *T. R. Ware*, *Geo. W. Holmes*, and *J. H. Tallichet* for defendants.

REPORT OF THE COMMISSION

MILLER, *Chairman:*

The complainants are the Brownsville Navigation District of Cameron County, Tex., operating port facilities at the port of Brownsville, which is in the vicinity of Brownsville, Tex., and F. A. Lallier and J. G. Philen, Jr., forwarding agents. By complaint

filed March 30, 1937, they allege that the defendants, Port Isabel & Rio Grande Valley Railway and the St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, trustee), hereinafter called the Port Isabel Railway and Brownsville Railway respectively, due principally to their failure to furnish equipment, refuse to permit traffic to move between the port of Brownsville and Matamoros, Tamaulipas, Mexico, in violation of sections 1 and 6 of the act; also that the refusal of the Brownsville Railway to permit equipment to be used for the transportation of freight between Mexico and the port of Brownsville while permitting the use of equipment for the transportation of freight between Mexico and ports other than the port of Brownsville, principally Corpus Christi, Tex., is unduly prejudicial to the port of Brownsville and unduly preferential of other ports, principally Corpus Christi, in violation of section 3 of the act. The prayer is for an order requiring defendants to furnish equipment for, and the transportation of, freight between the port of Brownsville and Matamoros and requiring removal of the alleged undue prejudice and preference.

The traffic concerned is that originating in the United States and foreign countries, arriving at Texas ports by water, destined to points in Mexico, and traffic originating in Mexico destined to these ports for movement beyond by water, interchanged with the National Railways of Mexico at the international gateways of Matamoros or Nuevo Laredo, Mexico. Complainants, realizing that our jurisdiction is confined to transportation in the United States, do not seek an order requiring the movement of defendants' equipment into or out of Mexico. The only order sought with respect to the latter movement is under section 3, which, of course, would be in the alternative.

Prior to the filing of the complaint, complainants instituted a mandamus proceeding in the District Court of the United States for the Southern District of Texas, asking for the same relief as that here sought under sections 1 and 6 of the act. On March 16, 1937, that court held that it was without jurisdiction to determine the matter and that it was one of an administrative nature to be determined by us. Complainants appealed from the district court to the United States Circuit Court of Appeals for the Fifth District, which, on July 15, 1937, after submission of the instant proceeding, reversed the holding of the district court and remanded the case for further proceedings. *Brownsville Navigation District* v. *St. Louis, B. & M. Ry. Co.*, 91 F. (2d) 502. In arriving at its decision the Circuit Court of Appeals said:

> The district court has jurisdiction to grant the petition for mandamus, and the fact, if it be a fact, that the petition discloses unreasonable and prejudicial

discrimination by any carrier against the Port of Brownsville is not sufficient to defeat jurisdiction to issue the writ. Such discriminational practice may be a proper subject for investigation and determination by the Commission under the amendment of August 12, 1935 (49 Stat. 607, C. 509), but no such administrative relief is sought in this cumulative proceeding which is solely for judicial relief by writ of mandamus for the alleged failure of the carriers to perform their transportation duties to furnish cars in accordance with the published tariffs, and to desist from an unfair and discriminational enforcement of fair and reasonable published tariffs, regulations, and transportation agreements with respect to car service. The case should be heard and decided on the merits, notwithstanding any cumulative remedies of a judicial or administrative nature which may be available to appellants.

The defendants in the instant proceeding, appellees in the circuit court proceeding, filed petition with the Supreme Court of the United States for writ of certiorari and on October 11, 1937, the court granted the writ and the case is now pending before that court. Following the defendants' petition to the Supreme Court the complainants filed a petition here in which they ask us to defer action on their complaint, insofar as the alleged violations of sections 1 and 6 are concerned, until the Supreme Court decides the question of jurisdiction respecting the alleged violations last referred to. Under the circumstances our finding at this time will be confined to the alleged violation of section 3.

While other ports are alleged to be preferred, the evidence offered relating to the alleged violation of section 3 was confined almost entirely to that respecting the furnishing of equipment for, and transportation of, freight between points in northern Mexico and the port of Corpus Christi through Laredo, Tex., which is on the international boundary line adjoining Nuevo Laredo, and the failure to furnish equipment for transportation between points in northern Mexico and the port of Brownsville through Brownsville, which is separated from Matamoros by a bridge across the Rio Grande.

The Port Isabel Railway does not reach the alleged preferred ports or participate in transportation to or from such ports and the alleged violation of section 3 is directed solely against the Brownsville Railway, the only other defendant.

One of the principal points in northern Mexico from and to which traffic moves through the Texas ports, and which is representative of other points in that territory, is Monterrey, which is on one of the lines of the National Railways of Mexico, 217 miles from Brownsville and 167 miles from Laredo, both of which, as above stated, are on the international boundary line.

The port of Brownsville, which is similar to other ports in the State of Texas, is about 160 miles south of Corpus Christi, with which it competes for traffic, including that destined to or originating in northern Mexico. The port of Brownsville was constructed by

the people of Brownsville in cooperation with the United States Government at a cost of approximately $6,000,000, over $2,000,000 of which was assumed by the people of Brownsville. Establishment of this port was accomplished by construction of a ship channel approximately 17 miles inland from the Gulf of Mexico to within about 5 miles of the city limits of Brownsville. This channel is 26 feet deep and will accommodate the type of sea-going vessels that call at Gulf ports, with the exception of some very heavy-draft vessels that engage in this service. However, the Navigation District has had approved by the United States Government authority to deepen the channel to 28 feet for the purpose of accommodating all sizes and types of vessels customarily calling at Gulf ports. Facilities offered by the port of Brownsville, where there is a turning basin, consist of two warehouses, each 400 by 120 feet, a concrete apron 25 feet on the wharf, and an apron 10 feet in the rear of the warehouses. In addition there is an open wharf 400 feet in length, all concrete, which is double tracked. In general the facilities are adequate for interchange of traffic between steamship lines and railroad companies. They are the customary character of facilities afforded at ports in general. The Navigation District obtains its revenue from the traffic moving through the port. This revenue is used for the purpose of maintaining and operating the port and, in addition, for the purpose of retiring bonds which were sold to the Government. This port, which was opened May 16, 1936, was constructed with the idea that it would draw to itself not only a considerable tonnage originating in or destined to the Rio Grande Valley in Texas, but on the assumption that it would be a natural gateway for traffic moving to and from the northern part of Mexico. An investigation by the port authorities prior to the opening of the port showed a possible tonnage of 192,600 tons which would move through this port to Mexico and 160,500 tons in the reverse direction. Complainants estimate that the tonnage inbound to Mexico would require about 6,400 cars and the outbound tonnage about 5,300 cars annually. The actual tonnage which moved through the port of Brownsville to and from Mexico up to the time of hearing, April 30, 1937, was 16,417 tons, and to and from points in the Rio Grande Valley in Texas it was 44,715 tons. The latter traffic is not involved in this proceeding.

The only rail line serving the port of Brownsville is the Port Isabel Railway, and the only route over which shipments from that port destined to points in Mexico can move is over the line of the Port Isabel Railway to its connection in the city of Brownsville with the Brownsville Railway, 7.2 miles, thence over the line of the Brownsville Railway across the international bridge to Matamoros, 3.67 miles, where it is turned over to the National Railways of Mexico.

Traffic originating in Mexico would move from Matamoros to the port of Brownsville in reverse order. The established charge for transportation of freight between the port of Brownsville and the international bridge is $11.25 per car, regardless of weight, made up of a switching charge of $8.10 of the Port Isabel Railway for the movement between the port and its connection with the Brownsville Railway in the city of Brownsville, and a switching charge of $3.15 of the Brownsville Railway for the movement between this junction and the international bridge. The propriety of these charges is not questioned by complainants, nor is there any showing that any different charges have been or are being demanded or collected. Charges for transportation between the international bridge and the yards of the National Railways of Mexico at Matamoros, which is over the tracks of the National Railways of Mexico, are published by the Brownsville & Matamoros Bridge Company, but for operating convenience the Brownsville Railway takes the cars across the bridge to the yards of the National Railways of Mexico at Matamoros, and also picks up cars at that place when destined to points in the United States.

It should here be stated that it is the custom in this country for the carriers enjoying the line haul on traffic originating on a switching line to furnish the switching line with equipment for such transportation. Such equipment is furnished the Port Isabel Railway by the line-haul carriers for movements from the port of Brownsville of traffic destined to points in the United States. The Mexican railways, which have the line haul on traffic moving between the port of Brownsville and points in the interior of Mexico, do not permit their equipment, loaded or empty, to enter the United States. If, therefore, traffic is to move by rail between the port of Brownsville and the interior of Mexico without transfer of lading, it will have to be in equipment other than that of the Mexican carriers.

The only equipment owned by the Port Isabel Railway consists of an engine, caboose, and passenger car. Up to November 1936 shipments moved from the port of Brownsville to Mexico through Matamoros in equipment furnished by the Brownsville Railway. Since that time, when the Brownsville Railway was requested to furnish several hundred cars for the transportation of coke from the port of Brownsville to Monterrey, it has refused to furnish any equipment for the movement of traffic from the port of Brownsville to the interior of Mexico or to switch traffic destined to Mexico from this port in American cars which other lines offer to furnish for this transportation.

Of the Mexican tonnage above referred to which moved after November 1936, 183 carloads were trucked to or from Matamoros,

where they were delivered to or received from the National Railways of Mexico. Shippers object to the transfer of lading at Matamoros because of the unskilled labor there used and the additional cost factor. Shippers also desire to have their shipments move under customs seal. They state that unless they can obtain through transportation without transfer of lading they will not ship through the port of Brownsville.

The port of Brownsville, due to its proximity to the international boundary line, is a natural port for traffic moving to and from Monterrey and other points in northern Mexico and from the shippers' standpoint a very desirable one for the following reasons. The water rates from and to the Texas ports are, generally speaking, equalized, as are the rates in Mexico from and to Brownsville and Laredo, the two nearest international gateways. While from the port of Brownsville the only cost to shippers for transportation in the United States is the switching charge above referred to, from and to other ports there are charges for line-haul service in addition to switching charges. For example, on iron and steel billets, which are commodities moving to Monterrey, the carload charges, based on a minimum of 40,000 pounds, from Corpus Christi to Laredo, are $102.20, while from the port of Brownsville to Matamoros they are $11.15, or $89.95 less.

The port of Corpus Christi is served through trackage arrangements or over their own tracks by the Southern Pacific Company, the Texas Mexican Railway Company, the San Antonio, Uvalde & Gulf Railroad Company, and the Brownsville Railway. The two carriers last named are parts of the Missouri Pacific system. Under an operating arrangement the lines reaching the port of Corpus Christi agree to alternate for a period of one year each in performing the switching service from and to that port for each other. The Texas Mexican Railway has waived its right to perform this service. Between the port of Corpus Christi and Monterrey, which is one of the largest if not the largest importer and exporter of traffic through the Texas ports, shipments move through Laredo and Nuevo Laredo. The movement of this traffic for that part of the haul between Corpus Christi and Laredo is over the line of the Texas Mexican Railway, 160 miles, or over the lines of the San Antonio, Uvalde & Gulf and the International–Great Northern Railroad Company, the latter line also being part of the Missouri Pacific system, 263 miles. As before stated, the distance between Laredo and Monterrey is 167 miles, making the distances between Corpus Christi and Monterrey over the above routes 327 miles and 430 miles respectively. Traffic between the port of Corpus Christi and Monterrey also moves through Brownsville and Matamoros, the movement between Corpus Christi and Brownsville

being over the Brownsville Railway, 157 miles, or over the Southern Pacific, 251 miles. The distance between Brownsville and Monterrey, as above shown, is 217 miles, making the distances over the above routes through Brownsville between Corpus Christi and Monterrey 374 miles and 460 miles respectively.

Complainants contend that the Brownsville Railway and other parts of the Missouri Pacific system have been and are now pursuing a deliberate and designed policy of undue prejudice to the port of Brownsville for the specific purpose of diverting traffic to the port of Corpus Christi or other ports reached by them. In support of this, complainants show that, while at the port of Brownsville the Brownsville Railway refuses to furnish cars for the loading of freight destined to Mexico or to switch cars offered by other lines for this traffic, including refusal to switch shipments in cars made empty and reloaded at this port, the Missouri Pacific lines during the periods they perform switching service at Corpus Christi switch empty cars owned by them or by other American lines from their connection with the Texas Mexican Railway and, after loading at the Corpus Christi docks, return them to the Texas Mexican Railway, which transports the shipments in connection with the National Railways of Mexico through Laredo to Monterrey. The switching charge at Corpus Christi is the same as that at Brownsville, $3.15. Complainants show that a number of cars which moved over the latter route contained freight originally intended for movement through the port of Brownsville, which because of the refusal of the Brownsville Railway to furnish cars or switch cars which the Southern Pacific offered for the service were diverted to the port of Corpus Christi.

The Brownsville Railway denies that the Missouri Pacific lines furnish cars at Corpus Christi to other lines for transportation to Mexico. It seeks to justify its refusal to switch any American-owned cars loaded at the port of Brownsville destined to Mexico, on the ground that such movement would be in violation of the car-service rules,[1] which require that cars made empty on lines other than those which own them should move loaded or empty in the direction of the owner road. The Brownsville Railway urges that the cars referred to by complainants switched by the Missouri Pacific lines at Corpus Christi to the Texas Mexican Railway, and which moved over the latter line to Laredo and thence over the National Railways of Mexico to Monterrey, were cars furnished by the Texas Mexican Railway, which cars were in the possession and account of that line, for which the Missouri Pacific lines performed the switching service as agent.

[1] Code of Car Service Rules of the Association of American Railroads.

It urges that while certain of these cars were owned by the Missouri Pacific lines, cars tendered for switching are not interchanged; and also that, while the cars switched by the Missouri Pacific lines to the Texas Mexican Railway included some owned by lines east of the Mississippi River, and the car-service rules require that cars made empty on foreign lines be moved loaded or empty in the direction of the owner road, the Missouri Pacific lines are in no sense responsible for the action of the Texas Mexican Railway in transporting these cars to Laredo for movement to Monterrey.

The Brownsville Railway states that its refusal to furnish equipment for transportation from the port of Brownsville to points in the interior of Mexico is not for the purpose of diverting traffic to other ports, but is because, as an intermediate switching line, it is under no obligation to do so. It also urges that to furnish cars for transportation from the port of Brownsville to destinations in the interior of Mexico, as to which its revenue would be only $3.15 for intermediate switching, would be in a practical sense a gratuity to the port of Brownsville. As heretofore indicated, on traffic moving from the port of Corpus Christi to Mexico through Brownsville or Laredo the Missouri Pacific lines could have a line haul to these gateways. The shipments referred to by complainants which were loaded at the port of Brownsville and which the Brownsville Railway refused to switch to Matamoros were in cars owned by the Pennsylvania Railroad Company which had been delivered by the Brownsville Railway to the Port Isabel Railway for unloading at that port. As heretofore stated the Brownsville Railway bases its refusal to switch freight, loaded at the port of Brownsville and destined to Mexico, in cars furnished by any other American lines, on the ground that the movement to Mexico would not be in the direction of the owner road and therefore would contravene the car-service rules above referred to. In other words, the Brownsville Railway takes the position that, as an intermediate switching carrier at Brownsville, it is its duty to see that the car-service rules as construed by it are observed, and accordingly it refuses to switch American-owned cars, including those furnished by other lines, loaded at the port of Brownsville and destined to Mexico, while as an originating switching line between the docks at the port of Corpus Christi and its connection with the Texas Mexican Railway at Corpus Christi, with respect to cars furnished by the latter line for loading at the docks, no duty rests upon it to see that such cars when loaded move in the direction of the owner road in accordance with the car-service rules. This position is untenable.

The Brownsville Railway takes the further position that performance of the switching service at Corpus Christi above described,

while refusing to perform switching service at Brownsville, is justified and does not result in undue preference or prejudice because at Corpus Christi it is serving an industry reached by it, while this is not true at Brownsville, where it performs only an intermediate switching service. As stated in *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I. C. C. 151, 172:

> We often have found that a carrier may be guilty of prejudice to or preference of a point which it does not reach by its own rails and this doctrine has been upheld by the courts.

The Brownsville Railway, during the time it performs switching service at Corpus Christi, is a necessary link in the transportation of shipments moving between that port and points in Mexico. It is likewise a necessary link in transportation between the port of Brownsville and Mexico.

The situation with respect to the refusal of the Brownsville Railway to furnish its own cars for transportation from the port of Brownsville to Mexico, while furnishing its cars for transportation from the port of Corpus Christi for the same service, differs materially at the two ports in that the cars furnished at Corpus Christi are for line-haul transportation over the Brownsville Railway or other Missouri Pacific lines, while with respect to shipments moving from the port of Brownsville the Brownsville Railway is only an intermediate switching line. The furnishing of cars by the Brownsville Railway at Corpus Christi for movement over its line, while refusing to furnish cars at the port of Brownsville as to which it does not get a line haul, cannot be said to result in undue preference or prejudice.

Complainants also show that shipments originating at Laredo move to Mexico in Missouri Pacific lines' equipment. Those referred to, that moved from Laredo, were cars furnished by the Texas Mexican Railway and were in the possession and control of that carrier. Complainants further show that the Brownsville Railway furnishes its cars for the transportation of freight moving from Brownsville to points in Mexico. These cars are furnished by the Brownsville Railway at Brownsville for movement of shipments originating at that place on its line. This carrier states that, while as a switching carrier it is under no legal obligation to furnish equipment for this transportation, it feels that it is under some obligation to furnish such cars for shipments originating on its line. There is no allegation that the port of Brownsville is in competition with Brownsville or Laredo in shipping to or from Mexico. The traffic concerned is that moving through the Texas ports to and from Mexico.

With respect to shipments moving from Mexico, complainants allege that the Brownsville Railway has instructed the Mexican lines not to furnish Missouri Pacific lines' or other American-owned equipment for loading and movement of freight to the port of Brownsville, in consequence of which such cars made empty in Mexico moved loaded through Laredo to Corpus Christi and other ports, instead of through Matamoros to the port of Brownsville. While the Missouri Pacific lines admittedly object to, and discourage the use of, their equipment made empty in Mexico for shipments as to which they do not enjoy a line haul from Laredo or Brownsville, it is denied that the alleged instructions have been given. Furthermore, it is pointed out that cars moving to Mexico are interchanged with the National Railways of Mexico, which are parties to the American car-service rules, and that the Missouri Pacific lines are in no position to dictate to the Mexican lines as to how equipment made empty in Mexico shall be used. The movement of most of the equipment of the Missouri Pacific lines to Mexico is through Laredo, and under the car-service rules it should move back to the United States through that gateway. Complainants also show that the Brownsville Railway has furnished its equipment at Matamoros to the Mexican lines for the loading of shipments destined to Corpus Christi through Brownsville, while it refuses to furnish its equipment for the movement of freight from Mexico to the port of Brownsville. The Brownsville Railway seeks to justify this on the ground that, as to shipments moving to the port of Corpus Christi, it enjoys a line haul and line-haul revenue, while on shipments moving from Mexico to the port of Brownsville it would be only an intermediate switching carrier. Complainants also show that the Brownsville Railway furnished several empty cars, switched them from Brownsville to Matamoros for loading in Mexico, and switched such cars, when loaded, back to Brownsville, from which point they subsequently moved over the line of the Southern Pacific to Galveston and Houston. The Brownsville Railway has its own line from Brownsville to the ports referred to. It states that it is not its policy or practice to furnish equipment for the use of the Southern Pacific from Mexico to Galveston and Houston, and that the cars referred to probably were consigned originally to an industry on the Brownsville Railway at Brownsville and subsequently were diverted to these ports.

We find that the refusal of the Brownsville Railway to furnish cars for the transportation of freight between the port of Brownsville and points in Mexico, while contemporaneously furnishing cars for transportation of freight between other ports in the United States and Mexico as to which it participates in the line-haul movement, is not unduly prejudicial or preferential. We further find that the failure of the Mexican lines to furnish American-owned equipment

for transportation from points in Mexico to the port of Brownsville does not result in any undue prejudice or preference by the Brownsville Railway. We further find that the refusal of the Brownsville Railway to switch at Brownsville cars furnished by other lines for the transportation of freight from the port of Brownsville to destinations in Mexico, while contemporaneously switching from the port of Corpus Christi to the Texas Mexican Railway at Corpus Christi freight destined to points in Mexico, in cars furnished by the latter line for movement by it to Laredo, and the National Railways of Mexico beyond, is unduly prejudicial to the port of Brownsville and unduly preferential of the port of Corpus Christi.

An order requiring removal of the undue prejudice and undue preference will be entered.

COMMISSIONERS AITCHISON and ROGERS did not participate in the disposition of this proceeding.

225 I. C. C.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 300.—October Term, 1937.

The St. Louis, Brownsville and Mexico Railway Company, et al., Petitioners, *vs.* Brownsville Navigation District of Cameron County, Texas, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 16, 1938.]

Mr. Justice Butler delivered the opinion of the Court.

Respondents applied to the United States court for the southern district of Texas to obtain a writ of mandamus[1] commanding petitioners to transport certain traffic and to furnish and continue for all time to furnish cars for transportation of freight between the Port of Brownsville, Texas, and Matamoros, Mexico. Petitioners by pleas to the jurisdiction asserted that the questions raised were essentially administrative and that therefore resort must first be had to the Interstate Commerce Commission. The district court heard evidence on the issues tendered by the pleas, sustained the petitioners' contention and dismissed the case. The cir-

[1] As defining jurisdiction, respondents rely on Judicial Code, § 24(8), 28 U. S. C. § 41: "The district courts shall have original jurisdiction . . . : . . . (8) Of all suits and proceedings arising under any law regulating commerce"; and on 49 U. S. C. § 49: "The district courts . . . shall have jurisdiction upon the relation of any person or . . . corporation alleging such violation by a common carrier, of any of the provisions of chapter 1 of this title [Interstate Commerce Act], as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ . . . of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ . . ."

As imposing duties for the enforcement of which the proceedings were instituted, respondents rely on the Interstate Commerce Act, 49 U. S. C. § 1(3): " . . . The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles . . . irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the . . . handling of property transported."

§ 1(4) "It shall be the duty of every common carrier . . . engaged in the transportation of . . . property to provide and furnish such transporta-

cuit court of appeals reversed. 91 F. (2d) 502. This Court granted a writ of certiorari. — U. S. —.

The city of Brownsville is on the north side of the Rio Grande opposite Matamoros. The respondent Navigation District, called the "Port of Brownsville," was incorporated under Texas law;[2] it includes a channel extending from the Gulf of Mexico about 17 miles to a turning basin which is located outside, and about five miles from the center of, Brownsville. The Port has no locomotive or cars; it has facilities at the basin to load and unload vessels, and a railroad track extending from the basin about a mile, to junction, at the boundary of the district, with a short branch or spur of petitioner, the Port Isabel & Rio Grande Valley Railway Company. Each of the other two respondents is engaged in business at the port as stevedore, freight broker, and forwarding agent. All the respondents are directly interested in the transportation of freight between the Port of Brownsville and points in Mexico via Matamoros.

Petitioner Thompson, as trustee in proceedings under § 77 of the Bankruptcy Act, operates the St. Louis, Brownsville & Mexico Railway and other lines of the Missouri Pacific System for transportation between gulf ports in Texas and Rio Grande crossings into Mexico. The Port Isabel, in all about 26 miles long, extends from the gulf to tracks operated by the trustee in the city of Brownsville. The Brownsville & Matamoros Bridge Company has a bridge and railroad tracks connecting the trustee's tracks in Brownsville with the National Railways of Mexico in Matamoros. Shipments between the Port of Brownsville and Matamoros must move about a mile over the tracks of the Navigation District, 7.4

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tion upon reasonable request therefor, . . . and to provide reasonable facilities for operating through routes . . ."

§ 1(11) "It shall be the duty of every carrier . . . to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

§ 6(1) "Every common carrier . . . shall file with the Commission . . . schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier. . . . If no joint rate over the through route has been established, the several carriers in such through route shall file . . . the separately established rates, fares, and charges applied to the through transportation . . ."

[2] Ch. 192, House Bill 724, 41st Legislature, Regular Session.

miles over the Port Isabel, 2.49 miles over the trustee's tracks and 1.24 miles over the Bridge Company's rails.

There is no joint rate applicable to transportation between the Port and Matamoros or any other point in Mexico over the tracks of petitioners, the Bridge Company and any railway in Mexico. The service performed by each petitioner is covered by a switching charge specified in its tariff filed with the Interstate Commerce Commission. Neither the tariff of the Port Isabel nor that of the trustee contains any rule, regulation or provision relating to the furnishing of cars for the transportation in question. The Port Isabel performs the initial movement of traffic from the Port; it has no cars or means to acquire any. The Mexican National Railways are the initial carriers of traffic in the other direction; they refuse to permit their cars to leave Mexico.

The trustee furnishes cars for transportation from the ports of Corpus Christi and Houston to gateways at Rio Grande crossings, including Laredo and Brownsville; in all that transportation he has substantial line hauls. But he refuses to permit cars delivered by him to the Port Isabel and taken by the latter to the basin for unloading to be reloaded for shipment into Mexico, and refuses to deliver to the Port Isabel cars under his control to be loaded at the Port; and if loaded there for transportation into Mexico he refuses to switch them en route. Without regard to ownership, control or distribution, the Port Isabel is willing to switch cars between the Port and its junction with the trustee's tracks.

After the district court dismissed this case, respondents filed with the Commission a complaint alleging that petitioners, principally by their failure to furnish equipment, refused to permit traffic to move between the Port and Matamoros, in violation of §§ 1 and 6 of the Interstate Commerce Act, and that the trustee's refusal to permit such use of his equipment, while permitting it between other ports and Mexico, violates § 3 of the Act. They prayed an order requiring petitioners to furnish equipment and to remove the prejudice and preference alleged. After hearing by the Commission but before its report, the circuit court of appeals announced its decision, in which it held that the district court has jurisdiction to grant mandamus, notwithstanding the petition for the writ alleged unreasonable and prejudicial discrimination

against the Port of Brownsville. After this Court granted the writ of certiorari, respondents filed a petition with the Commission asking it to defer action upon their allegations of violation of §§ 1 and 6. And the Commission did limit its decision to alleged violations of § 3. It held that the refusal of the trustee to furnish cars was not unduly prejudicial or preferential.

The respondents do not complain that petitioners refuse to switch cars furnished by other carriers or by the Port itself. Their grievance is not that petitioners refuse to do the switching covered by their tariffs at the specified rates; it is that in applying their tariffs, they discriminate against the Port of Brownsville in order to divert traffic to other ports and gateways so that the trustee may obtain substantial line hauls. The Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis etc. Co.* v. *So. Pac. Co.*, 283 U. S. 654.

As the Port Isabel does not own or control any freight cars, respondents may not have relief on the ground that the failure of that carrier to furnish them is unreasonable discrimination. As the trustee participates in traffic between the basin and points in Mexico only to the extent of an intermediate switching movement, he is not, as a matter of law, bound to furnish cars even for the part of the transportation that is performed within the United States. The question, whether the discrimination in the application of his tariff covering the switching movement is unreasonable, is an administrative one. Appropriate consideration of it may extend to many facts and circumstances, including the influence, if any, of the discrimination upon the trustee's line hauls between other Texas ports and points in Mexico, and to the broad field of competition legitimately available to carriers, shippers and commodities seeking transportation between the United States and Mexico. And the ascertainment of appropriate remedy for discrimination condemned calls for another administrative determination involving, it may be, investigation of numerous conditions

affecting transportation between the two countries. And as determination of reasonableness of petitioners' refusal to furnish cars for the transportation in question and the prescribing of change in the service, if any is to be ordered, are primarily within the regulatory powers of the Commission, the district court rightly held that it was without jurisdiction and dismissed the cause. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493. *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304, 313. *Tex. & Pac. Ry.* v. *Am. Tie Co.*, 234 U. S. 138, 146. *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291. Cf. *Pennsylvania R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 468. The decree of the circuit court of appeals must be reversed.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.